IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN COLBERT and ITSUMI ISHITANI, husband and wife and their marital community, Appellants, v. MICHAEL and MOLLY KLUPFELL, husband and wife and their marital community, Defendants, GEORGE REZENDES and LINDSAY HAMILTON, husband and wife and their marital community, Respondents.	No. 33402-0-II UNPUBLISHED OPINION

Van Deren, A.C.J. – John Colbert and Itsumi Ishitani (the Colberts) appeal from a summary judgment dismissing their adverse possession and mutual recognition and acquiescence claims against George Rezendes and Lindsay Hamilton (the Rezendeses). The Colberts claim that their predecessors-in-interest's supplemental declarations about their use of the disputed area created material issues of fact. Because the supplemental declarations clarify, not contradict, the earlier declarations, the trial court properly found no unresolved material issues of fact and

dismissed the case because the Colberts could not establish the statutory 10-year period under either theory. Thus, we affirm.

Facts

Since December 1997, the Colberts have owned property at 1221 Tyler Street in Port Townsend. It borders two lots on their south side: Michael and Molly Klupfells' (the Klupfells) at 110 F Street and the Rezendeses' at 136 F Street. From December 1981 until the summer of 1996, Mary Lou Wolfe owned the now-Colbert property. Wolfe's daughter and son-in-law, Laura and Mark Burn, rented and lived there until January 1996.[1]

On May 25, 2001, Arnold Wood recorded a survey of the property lines showing that both a six-foot cedar fence between the Colberts and the Klupfells and a wire fence between the Colberts and the Rezendeses were south of the recorded lot line.[2]

On July 26, 2004, the Colberts filed this action to quiet title to the land between the fences and the recorded lot line. They asserted title to the land north of a six-foot high cedar fence along the Klupfell-Colbert line and to the land north of a wire fence along the Rezendeses' property. On January 14, 2005, the Klupfells and Rezendeses moved for summary judgment, seeking a declaration that Wood's survey represented the correct legal boundary. On February 3, 2005, the Klupfells settled with the Colberts, agreeing to establish the location of the

[1] Susan Aikens owned the property from the summer of 1996 until she sold it to the Colberts. According to Aikens, the Rezendeses installed a wire fence to contain their dog. She described the disputed strip as "very thickly overgrown with bushes and there was no indication of any use or possession of that area by the previous owners." Clerk's Papers (CP) at 63.

[2] George Rezendes installed the wire fence to contain his dog. As the area was thick with brush and trees, he ran it where he could to avoid cutting the bushes and a large maple tree. He said he did not intend it to mark the boundary line.

cedar fence as the legal boundary. On May 10, 2005, the trial court granted summary judgment to the Rezendeses and dismissed the Colberts' complaint. The Colberts appeal.

Discussion

I. Adverse Possession

The Colberts claim title to the disputed strip, claiming that the Burns before them and they, from 1997 to the present, continuously possessed and used this land as their own. They also argue that summary judgment was inappropriate because material unresolved issues of fact exist with regard to inconsistencies between the Burns' declarations and their supplemental declarations.

Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A person claiming adverse possession has the burden of showing possession that is (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile and under a claim of right made in good faith. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997). These elements must exist concurrently for a period of at least 10 years. RCW 4.16.020; *Chaplin*, 100 Wn.2d at 861; *Lilly*, 88 Wn. App. at 312. Whether known facts amount to adverse possession is a question of law reviewed de novo. *ITT Rayonier*, 112 Wn.2d at 758; *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980), *overruled on other grounds*, *Chaplin*, 100 Wn.2d at 862; *Bryant v. Palmer Coking Coal Co.*, 86

Wn. App. 204, 210, 936 P.2d 1163 (1997).

The Colberts rely on the declarations of Laura and Mark Burn to establish a 14-year period of continuous possession. They claim that the Burns' use of the disputed strip as a children's play area, storage area for restaurant equipment and lumber, and as a parking area satisfied all the elements of adverse possession. Laura Burn declared, in part:

> When we first moved into the Tyler Street Residence . . . [t]he wooden fence extended from near the edge of Tyler Street westerly to the northwestern corner of the Fenley property along the southern boundary of our property. At this point began a wooded area separating the adjacent property (currently owned by Rezendes/Hamilton) along the southern boundary. Within this wooded area were a few remnants of a wire fence. . . . To the best of my knowledge the remnants of the wire fence near the southern boundary of our property and the northern boundary of what is now the Rezendes/Hamilton property also remained in place during our entire occupancy of the property from January 1982 to January 1996.
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> . . . [A] second large maple tree was located further back on our property about 12 feet west of the end of the cedar fence near the remnants of the wire fence adjacent to the Rezendes/Hamilton property. In this maple tree my husband built a tree house in the mid-1980's for our two children to play on. . . .
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> . . . During our occupancy of the Tyler Street Residence . . . we made exclusive use of the property up to the wooden fence bordering the Fenley property and the area bordering the Rezendes/Hamilton property in the vicinity of the maple tree with the tree house and in the same area with the large items we stored on the property. Our use of the property included the use of the tree house and large maple tree, parking guest cars in this area when we had visitors, piling lumber and other items in the area adjacent to the maple tree with the tree house in it and to the Rezendes/Hamilton property. . . .
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> . . . In regards to the area of our property that bordered the property now owned by Rezendes/Hamilton, our children regularly played on the ground around the maple tree and in the tree house in the maple tree install by my husband Mark Burn from the mid-1980's until we left the property in January 1996. In this same area my husband stored lumber and other supplies for extended periods during our occupancy. . . .

CP at 34-36. Additionally, Mark Burn declared, in part:

> We made exclusive use of our property up to the 6 foot high cedar fence and in the vicinity of both maple trees, including the one with the tree house in it. We regularly parked cars for our guests behind the large maple tree located close to

> Tyler Street. I also stored a large pile of commercial restaurant equipment on the property within a few feet of the second large maple and west of the end of the cedar fence for about [a] 2 year period between 1983 and 1985. . . . At other various times between 1982 and 1996 we regularly stored other large items such as lumber between the two maple trees and west of the end of the cedar fence, adjacent to the Rezendes/Hamilton property. I also regularly mowed the area all the way up [to] the cedar fence. I also built a wood shed to the west of the second large maple with the tree house in it.
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> . . . During the entire time of our occupancy at the Tyler Street Residence between January 1982 and January 1996, both myself and my wife always assumed that property up to the cedar fence, and the property in the vicinity of the maple tree with the tree house and storage items I placed on the property were our property and part of our yard area. We never received any indication otherwise from any neighbor including Susan and Richard Fenley. . . . Furthermore, the predecessors to [Rezendes/Hamilton] . . . also never made claim to or asserted any ownership rights to the property on our side of the wooden [sic] area and immediately around the second large maple tree with the tree house in it.

CP at 56-57. These declarations appear to support the Colberts' claim. But on April 5, 2005, the Burns filed supplemental declarations regarding the Rezendeses' portion of the property line.

Laura declared in part:

> On the eastern part, along the Fenleys' (now Klupfells') boundary, there was a wood fence/wind screen which we treated as the Fenleys' boundary. Along what is now the Rezendes/Hamilton property there was no fence that connected to the Fenleys' wooden fence.
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> . . . Starting at the western end of the Fenleys' fence, there was no clear line of occupation as is depicted by the fence shown on the Arnold Wood survey, ... The area between the properties was brushy and we did not mow or cultivate it in any way.
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> . . . The flowers I stated in my original declaration I used to cut were taken from the area adjacent to the Fenleys' wooden fence.
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> . . . We did build a tree house for the children in the maple tree along the Rezendes[es'] boundary which is apparently right on the boundary line . . . as determined by Mr. Wood. Aside from the tree house, there was no improvement that I made in the area depicted between the Wood survey line and the fence line on the Rezendes[es'] property.
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> . . . There were remnants of a fence over to the west where the Rezendes[es'] fence runs along the Wood survey line. My husband also built a firewood shed along that portion of the boundary where the Rezendes[es'] fence runs on the Wood survey line. The shed was just north of the line.
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> . . . We enjoyed our neighbors and the children moved back and forth with

> other children, playing in various yards. The area along the Rezendes[es'] property was so brushy and wooded that we did not know where the property line was and it never came up between any of the neighbors who lived in the Rezendes/Hamilton home and ourselves.

CP at 67-68. Mark declared in part:

> I was relying on the Fenley/Klupfell fence as a point up to which I could mow, park cars and store lumber.
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> . . . Along what is now the Rezendes[es'] property line, the only indication of a fence were remnants along the west side of the Rezendes[es'] property which did not clearly define a property line. I constructed a firewood shed along what I presumed to be the property line.
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> . . . I built a tree house in the large maple tree to the west of where the Fenleys' wood fence ended. I did store some equipment for a period of time to the northeast of the maple tree with the tree house. The tree house was there for approximately 7 or 8 years.
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> . . . The area between the survey line and the fence along the Rezendes[es'] property was pretty rough and brushy. There was a pathway through this brush where the children went back and forth to play with their friends. There was no attempt by either our southern neighbors, where the Rezendes[es] now live, or us to establish and occupy to any line. That fence went in after we moved away.
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> . . . I did store items north of the survey line and east of Rezendes[es]' property for periods of time. I didn't do anything that would have put my neighbor to the south on notice that I was claiming to a specific line.

CP at 66.

The pivotal question in this case is the effect of these supplemental declarations. Do they "clarify" the earlier declaration, as the Rezendeses suggest, or do they contradict the earlier declarations, thereby creating a material issue of fact, as the Colberts suggest?

In *State Farm Mutual Automobile Ins. Co. v. Treciak,* 117 Wn. App. 402, 407-09, 71 P.3d 703 (2003), we discussed whether a later, contradictory affidavit needed to be struck because one cannot create a genuine issue of material fact merely by filing a later affidavit inconsistent with the first. There we applied the rule from *Safeco Insurance Co. of American v. McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991), that striking the later declarations is improper

when (1) the later statement did not flatly contradict the first and (2) the defendant explained the inconsistencies. *State Farm*, 117 Wn. App. at 409. We held that "we review those statements along with all the evidence presented to see if there is an issue of fact for the jury." *State Farm*, 117 Wn. App. at 409.

We agree with the trial court that the later declarations are consistent with the first and do not create a material issue of fact. It is undisputed that the Burns maintained and used the property up to the cedar fence as their own. And their use of that area was resolved in settlement and is not before us. While the first declarations show that the Burns intruded into the disputed Rezendes-Colbert strip and undeniably used this property during their tenancy, they never occupied it, maintained it, or gave any overt signs of ownership. Rather, the cedar fence ended at the Klupfell-Rezendes property line—the land beyond that was left in brush and the tree house was apparently built in a tree on the boundary line and existed only for seven or eight years. The Colberts claim that the Burns parked cars in the area. But the first Burns' declarations are, at best, ambiguous about where cars were parked. Further, any parking was occasional, not continuous, and there is no indication of how frequently or for what duration. Similarly, the Burns' storage appears to have been intermittent and, as the later declaration makes clear, not sufficiently visible to alert the true owner of an ownership claim. And the tree house is little support for the Colberts' claim. Mark Burn's later declaration states the tree house existed for only seven or eight years and that the tree was on the property line. As Mark Burn states in his second declaration, "I didn't do anything that would have put my neighbor to the south on notice that I was claiming to a specific line." CP at 66.

The Colberts claim that we need to take as true all statements in the first Burns'

declarations. This is certainly true where a later declaration contradicts an earlier one, but where the first declaration is vague, such as here, the later declaration adds to the first, clarifying it.

Because the Colberts cannot establish the elements of adverse possession without relying on the Burns' 14-year occupancy, we need not resolve issues related to when, where, and why the Colberts put up a wire fence, and whether Susan Aikens discussed the survey lines with the Colberts and recognized the true boundaries. These become non-issues because the Colberts cannot establish the 10-year period of continuous and exclusive possession necessary to their claim.

II. Mutual Recognition and Acquiescence

The Colberts also claim that they established the boundary line through mutual recognition and acquiescence.

The doctrine of mutual recognition and acquiescence supplements adverse possession. *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996) (citing 17 William B. Stoebuck, Washington Practice Real Estate Property Law § 8.21, at 519 (1995)). A party may establish a boundary by mutual acquiescence by proving an express agreement to a well-defined line, designated on the ground in some way, for example, by monuments, roadways, or fence lines. Absent an express agreement, the claiming party must show that the adjoining landowners, or their predecessors in interest, have in good faith recognized and accepted the designated line as the true boundary line by their acts, occupancy, and improvements. Finally, the claiming party must show continuous mutual recognition and acquiescence to the line for the period required for adverse possession. *Lamm v. McTighe*, 72 Wn.2d 587, 592-93, 434 P.2d 565 (1967). Acquiescence in a property line cannot be established by one party's unilateral acts. *Heriot v.*

Smith, 35 Wn. App. 496, 501, 668 P.2d 589 (1983) (citing *Houplin v. Stoen*, 72 Wn.2d 131, 431 P.2d 998 (1967)).

If the line is insufficiently defined, a claim for boundary adjustment by mutual recognition and acquiescence fails. *See*, *e.g.*, *Waldorf v. Cole*, 61 Wn.2d 251, 255, 377 P.2d 862 (1963) (disputed strip of land unused; only improvement was rockery built against a dirt bank); *Scott v. Slater*, 42 Wn.2d 366, 367-68, 255 P.2d 377 (1953) (only a row of pear trees; no fence or other mark to define line; cultivation of disputed strip varied), *overruled on other grounds by Chaplin*, 100 Wn.2d 853; *Lloyd*, 83 Wn. App. at 856 (concrete blocks moveable by tides, intermittent moorage, and the seeding of oysters and clams); *but cf. Windsor v. Bourcier*, 21 Wn.2d 313, 316, 150 P.2d 717 (1944) (upholding boundary marked by electric pole and cedar tree, where original owners treated that line as true line and subsequent purchasers had notice of line).

Our discussion of the failings in the Colberts' adverse possession claim similarly dispense with this claim. Again, the Colberts fail to show the requisite 10-year period to avoid summary judgment.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Van Deren, A.C.J.

We concur:

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Bridgewater, J.

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Hunt, J.